A

Wong Sie Kwong & Anor v Helena ak Kubal (the administratrix of the estate of Tini ak Kilat, deceased)

B

HIGH COURT (SIBU) — CIVIL APPEAL NO SBW-12B-2/6 OF 2018
LIM HOCK LENG JC
8 FEBRUARY 2019

C

Tort — Road accident — Appeal against quantum and liability — Sessions court held defendants solely liable and awarded plaintiff damages for dependency and special damages — Whether sessions court judge plainly wrong on liability — Whether award by sessions court on loss of dependency correct — Whether award by sessions court on food and beverages should be set aside

D

On 22 October 2012, there was a fatal road accident along Jalan Sibu/Bintulu at KM 123 involving a car whose driver died at the scene of the accident, and a lorry. The wife of the deceased driver of the car brought an action, as the administratrix of his estate, against the lorry driver as the first defendant and

E

the registered owner of the lorry as the second defendant on the basis of vicarious liability. The sessions court found the defendants solely liable and awarded the plaintiff damages for dependency in the sum of RM177,567.30 and special damages. The defendants appealed against the decision of the sessions court on liability and, on quantum, against the awards of RM7,000 for

F

food and beverages and RM225,000 for loss of dependency only.

Held:

(1) Taking into consideration the totality of evidence, the defendants had not shown that the learned sessions court judge had insufficient judicial appreciation of the evidence or that he was plainly wrong on liability. There was no discernible error, let alone a plain error, in the reasoning of the learned sessions court judge as to the inconsistencies in the testimony of the first defendant who was the sole witness for the defendants. It may be added that the learned sessions court judge, not without reason, considered the first defendant's unpleaded allegation that the car was overtaking a Prime Mover, as an afterthought (see paras 8 & 14).

(2) The plaintiff contended that the deductions went to the deceased's wife and daughter but there was nothing in her witness statement to prove that these amounts went into her account or her daughter's account. Neither did the plaintiff provide any explanation as to what the deductions were and the circumstances in which they were made and how they were utilized. Regarding the award by the sessions court on the loss of dependency in the sum of RM1,972.97 per month, the deceased

surely could not have given his dependents more than his average monthly nett pay of RM1,411.25. The award of RM177,567.30 was thus varied and reduced to RM84,674.70 (see paras 20–22).

(3) As for the award of RM7,000 for food and beverages by the sessions court, the plaintiff did not produce any receipt or proof that such sum was actually incurred. It was no more than a bare claim made in her witness statement. There was no evidence as to the number of people who attended the funeral who were given food and beverages, the type of food and beverages and no breakdown of the food and beverages served. The plaintiff who bears the burden of proving her losses, particularly special damages which must generally be strictly proved, did not even give evidence as to who the suppliers or caterers were. There was thus no evidence or basis for the sessions court to award RM7,000 for food and beverages as funeral expenses. This award was thus set aside (see paras 24–26).

(4) The sessions court's finding of liability against the defendants wholly was maintained. No order was made as to costs for the appeal. The other special damages were maintained as were the costs of RM21,000, all of which were unchallenged at the hearing of the appeal (see para 27).

[Bahasa Malaysia summary

Pada 22 Oktober 2012, terdapat satu kemalangan maut jalan raya di Jalan Sibu/Bintulu pada KM 123 melibatkan sebuah kereta yang pemandunya meninggal dunia di tempat kejadian, dan sebuah lori. Isteri pemandu kereta yang meninggal dunia membawa tindakan, sebagai pentadbir harta pusaka, terhadap pemandu lori sebagai defendan pertama dan pemilik berdaftar lori sebagai defendan kedua atas dasar liabiliti vikarius. Mahkamah sesyen mendapati defendan bertanggungjawab sepenuhnya dan mengawardkan plaintif ganti rugi untuk kebergantungan dalam jumlah RM177,567.30 dan ganti rugi khas. Defendan hanya merayu terhadap keputusan mahkamah sesyen pada liabiliti dan, pada kuantum, terhadap award RM7,000 untuk makanan dan minuman dan RM225,000 kerana kehilangan kebergantungan.

Diputuskan:

(1) Dengan mengambil kira keseluruhan keterangan, defendan tidak menunjukkan bahawa hakim mahkamah sesyen yang bijaksana mempunyai penghargaan kehakiman yang tidak mencukupi terhadap keterangan atau bahawa beliau benar-benar salah pada liabiliti. Tiada kesilapan yang jelas, apalagi kesilapan biasa, dalam alasan hakim mahkamah sesyen yang bijaksana tentang ketidaksejajaran dalam testimoni defendan pertama yang menjadi saksi tunggal bagi defendan. Adalah boleh ditambah bahawa hakim mahkamah sesyen yang bijaksana, bukan tanpa sebab, menganggap dakwaan defendan pertama yang tidak

A diplidkan bahawa kereta itu telah memintas Prime Mover, sebagai pemikiran semula (lihat perenggan 8 & 14).

(2) Plaintif berpendapat bahawa pemotongan tersebut masuk kepada isteri dan anak perempuan si mati tetapi tiada apa-apa dalam kenyataan saksinya untuk membuktikan bahawa jumlah ini masuk ke akaunnya atau akaun anak perempuannya. Tidak juga plaintif memberikan penjelasan tentang apa potongan tersebut dan keadaan di mana ia dibuat dan bagaimana ia digunakan. Berhubung dengan award oleh mahkamah sesyen atas kehilangan kebergantungan dalam jumlah RM1,972.97 sebulan, si mati pasti tidak dapat memberi tanggungannya lebih daripada purata gaji bulanan bulanannya sebanyak RM1,411.25. Award sebanyak RM177,567.30 telah diubah dan dikurangkan kepada RM84,674.70 (lihat perenggan 20–22).

(3) Bagi award sebanyak RM7,000 untuk makanan dan minuman oleh mahkamah sesyen, plaintif tidak mengemukakan apa-apa resit atau bukti bahawa jumlah sedemikian sebenarnya ditanggung. Ia tidak lebih daripada tuntutan kosong yang dibuat dalam kenyataan saksi beliau. Tiada keterangan mengenai bilangan orang yang menghadiri pengebumian yang diberi makanan dan minuman, jenis makanan dan minuman dan tiada huraian tentang makanan dan minuman yang disediakan. Plaintif yang menanggung beban membuktikan kerugiannya, terutamanya ganti rugi khas yang secara umumnya harus dibuktikan dengan ketat, tidak memberi keterangan tentang siapa pembekal atau katerer. Oleh itu, tiada keterangan atau asas bagi mahkamah sesyen untuk mengaward RM7,000 untuk makanan dan minuman sebagai perbelanjaan pengebumian. Oleh itu, award ini diketepikan (lihat perenggan 24–26).

(4) Dapatan mahkamah sesyen tentang liabilti terhadap defendan sepenuhnya adalah dikekalkan. Tiada perintah dibuat untuk kos untuk rayuan tersebut. Ganti rugi khas yang lain dikekalkan seperti kos RM21,000, yang semuanya tidak dapat dicabar pada pendengaran rayuan (lihat perenggan 27).]

Notes

For a case on quantum and liability, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2387.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Fatimah bte Derakman v Wan Jusoh bin Wan Kolok & Anor [1994] MLJU 190, HC (refd)
Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira [2009] 7 MLJ 711; [2009] 2 CLJ 499, HC (refd)
Ng Aik Kian & Anor v Sia Loh Sia [1997] MLJU 143; [1997] 2 CLJ SUPP 218, HC (refd)
Takong Tabari v Government of Sarawak & Ors [1996] 5 MLJ 435; [1996] 2 CLJ 1068, HC (refd)
Wong Kum Keong v Yeap Chooi [1987] 1 MLJ 290, SC (refd)

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(d)
Road Transport Act 1987 s 41(1)

Gladys Lee (Gladys and Brandon) for the appellants.
Catherine David (Khaira & Co) for the respondent.

Lim Hock Leng JC:

[1] On 22 October 2012, there was a fatal road accident along Jalan Sibu/Bintulu at KM 123 involving a motor vehicle bearing the licence plate number QTA 4922 ('the car') whose driver died at the scene of the accident, and a lorry bearing the licence plate No QSV 6658 ('the lorry').

[2] The wife of the deceased driver of the car brought an action, as the administratrix of his estate, against the lorry driver as the first defendant and the registered owner of the lorry as the second defendant on the basis of vicarious liability.

[3] After the trial, the sessions court found the defendants solely liable.

[4] In terms of liability, the issue was whether the first defendant had encroached onto the deceased's side of the road in a negligent manner.

[5] The sessions court awarded the plaintiff damages for dependency in the sum of RM177,567.30 and special damages as follows:

(a)	cost of funeral expenses (food and beverages)	RM7,000
(b)	cost of coffin	RM3,800
(c)	cost of one concrete plot c/w sealing	RM3,000
(d)	cost of tombstone and cemetery work	RM12,000

(e)	damages to personal effects (clothing, shoes, bag, wrist watch)	RM650
(f)	cost of medical report, police reports, sketch plan, JPJ search and business search	RM60
	Total special damages	RM26,510

[6] The defendants appealed against the decision of the sessions court on liability and, on quantum, against the awards of RM7,000 for food and beverages and RM225,000 for loss of dependency only.

[7] For convenience, the parties will be referred to as they were in the sessions court.

[8] Taking into consideration the totality of evidence including the testimony of PW1 and PW3 who were passengers in the car, the location of most of the debris and the lorry's brake marks on the path of travel of the car, the considerable length of the lorry's brake marks measuring about 65 meters, the resting position of the lorry and the damaged part of the lorry as evidenced by photographs, the defendants have not shown that the learned sessions court judge had insufficient judicial appreciation of the evidence or that he was plainly wrong on liability.

[9] As was held by the Federal Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163:

> It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy *Crofter Harris Tweed Co v Veitch* [1942] 1 All ER 142 (HL) per Lord Porter at p 167.

[10] In *Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira* [2009] 7 MLJ 711; [2009] 2 CLJ 499, Balia Yusof J (as he then was) held:

> On the issue of liability, I appreciate that this appeal is basically against the finding of facts made by the learned sessions court judge. As such the court would always be slow and reluctant to disturb such finding of facts unless it can be shown that such finding could not be sustained by having regard to the evidence made available before the trial judge (see *Johari bin Khalid & Anor v Mohamad Zamri bin Khalid & Anor* [1985] 1 MLJ 142, *Hashim bin Abu Hassan (suing as the legal parent and*

dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors [2006] 1 MLJ 297). Principles involving appellate interference on finding of facts are well established and as an appellate court, I have to, at the outset, start on the working presumption that any decision appealed against is right in every respect. So to succeed the appellant must convince me that the decision appealed from is wrong (see *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214). Appellate courts do not make finding of facts but merely review the finding of primary facts made by the trial judge (see *Eng Thye Plantation Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245, *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545).

[24] The learned sessions judge who has heard and seen the witnesses has an advantage and is in a better position to assess the evidence before her, and that decision of hers is entitled to great respect (see *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153, *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465).

[11] On the specific findings of fact, it suffices to refer to a few authorities. In *Fatimah bte Derakman v Wan Jusoh bin Wan Kolok & Anor* [1994] MLJU 190 and *Ng Aik Kian & Anor v Sia Loh Sia* [1997] MLJU 143; [1997] 2 CLJ SUPP 218, authorities cited by learned counsel for the plaintiff, it was held that the location of the debris is indicative of the point of impact. The long brake marks are indicative that the lorry must have been travelling at a high speed. See *Wong Kum Keong v Yeap Chooi* [1987] 1 MLJ 290. Indeed, the first defendant admitted during cross-examination that the lorry was going at 80km per hour and he was, before the collision, negotiating a right-hand bend.

[12] The defendants' argument that the evidence of PW1 is suspect because he had failed to mention certain details in the police report such as the registration numbers of the vehicles is insufficient to persuade this court to overturn the decision of the learned sessions court judge, more so as PW1 had specified the date and place of the accident.

[13] Likewise, the defendants' arguments on the police investigation report, apart from PW4's recommendation that the deceased be charged under s 41(1) of the Road Transport Act 1987 which he later accepted as incorrect.

[14] There is no discernible error, let alone a plain error, in the reasoning of the learned sessions court judge as to the inconsistencies in the testimony of the first defendant who was the sole witness for the defendants. It may be added that the learned sessions court judge, not without reason, considered the first defendant's unpleaded allegation that the car was overtaking a prime mover, as an afterthought.

A **[15]** Turning now to the loss of dependency award, the learned sessions court judge held that the deceased had an average monthly income of RM2,959.45 and made the usual 1/3 deduction of that as his personal monthly expenses. On that basis, the deceased was treated as having given his dependents a monthly sum of RM1,972.97.

B

[16] As the deceased was 40 years old when he passed away, the calculation for loss of support or dependency, in accordance with s 7(3)(iv)(d) of the Civil Law Act 1956 was carried out in the following manner:

C

RM1,972.97 x 12 months x [55-40÷2] = 7.5

RM1,972.97 x 12 months x 7.5 = RM177,567.30

D

[17] However, if we look at the deceased's payslips for July to September 2012 which were produced by the plaintiff vide pp 173–175 of the record of appeal, we will see that his average monthly nett pay, after various deductions, is RM1,411.25.

E

RM1,766.55 + RM1,233.60 + RM1,233.60 = RM4,233.75 ÷ 3 = RM1,411.25

[18] If we take 1/3 off RM1,411.25 for the deceased's personal living F expenses, that would mean RM940.83 is the monthly amount he gave to his dependents.

[19] Applying the formula prescribed by s 7(3)(iv)(d) of the Civil Law Act 1956, the damages would be RM84,674.70 which is derived from the G following calculation:

RM940.83 x 12 x 7.5 = RM84,674.70

H **[20]** Learned counsel for the plaintiff contended that the deductions went to the deceased's wife and daughter but there is nothing in her witness statement to prove that these amounts went into her account or her daughter's account.

[21] Neither did the plaintiff provide any explanation as to what the I deductions were and the circumstances in which they were made and how they were utilised. For instance, there are deductions for 'insuran kelompok' in the sum of RM20 and for 'lucut gaji' in the sum of RM100 in the August 2012 payslip but the plaintiff did not testify or provide any evidence that she is entitled to loss of dependency for those deductions. Further, there was a

deduction of RM986.40 under the description 'Koperasi Tentera' in the payslip but we do not know whether the deduction went towards the armed forces co-operative for investment purposes or towards an insurance scheme and whether the plaintiff received any payment from the co-operative upon her husband's death. There may be some other reason for the deduction. The plaintiff did not give evidence in that respect.

[22] Returning to the award by the sessions court on the loss of dependency in the sum of RM1,972.97 per month, the deceased surely could not have given his dependents more than his average monthly nett pay of RM1,411.25. The award of RM177,567.30 is thus varied and reduced to RM84,674.70.

[23] That said, there are cases where the 1/3 deduction for personal expenses may be correctly made from the gross pay, instead of the nett pay. For instance, where the income is low and there is no or negligible deduction on account of income tax and there are no recurring deductions such as loan repayments.

[24] As for the award of RM7,000 for food and beverages by the sessions court, it is noted that the plaintiff did not produce any receipt or proof that such sum was actually incurred. It was no more than a bare claim made in her witness statement.

[25] No doubt it is well-established that in accident claims, which by their very nature, are unexpected, the plaintiff cannot be expected to have collated and kept receipts particularly as to personal effects which are damaged in the accident (see *Takong Tabari v Government of Sarawak & Ors* [1996] 5 MLJ 435; [1996] 2 CLJ 1068). However, in this case, there was no evidence as to the number of people who attended the funeral who were given food and beverages. There was no evidence as to the type of food and beverages. There was no breakdown of the food and beverages served. The plaintiff who bears the burden of proving her losses, particularly special damages which must generally be strictly proved, did not even give evidence as to who the suppliers or caterers were.

[26] There was thus no evidence or basis for the sessions court to award RM7,000 for food and beverages as funeral expenses. This award is thus set aside.

[27] To recapitulate, the sessions court's finding of liability against the defendants wholly is maintained. No order is made as to costs for the appeal, as it is only allowed in part as to quantum. The other special damages (the costs of the coffin, funeral plot, tombstone, personal effects and the costs of obtaining the medical and police reports, sketch plan, and the searches) are maintained as

A are the costs of RM21,000, all of which were unchallenged at the hearing of the appeal.

Order accordingly.

B Reported by Ahmad Ismail Illman Mohd Razali

C

D

E

F

G

H

I